

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ARTHUR MONCRIEF,	:	CASE NO. 1:06-CV-2641
Petitioner,	:	
vs.	:	OPINION & ORDER
MAGGIE BEIGHTLER,	:	[Resolving Docs. No. <u>1</u> , <u>7</u> , <u>8</u> , <u>10</u> .]
Respondent.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On October 31, 2006, Petitioner Arthur Moncrief filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus. [Doc. 1.] With his petition, Moncrief seeks relief from the judgment and sentence that an Ohio state court imposed following Moncrief's plea of guilty to one count of attempted rape and one count of felonious assault. [Id.] In support of the petition, Moncrief alleges that (i) he was denied effective assistance of counsel on appeal because his attorney did not challenge the failure of the trial court to rule on post-release control at sentencing and did not request that the appellate court hold the ruling on Moncrief's appeal in abeyance pending the decision in *State v. Foster*, 845 N.E.2d 470 (Ohio 2006); and (ii) he was denied his Sixth and Fourteenth Amendment rights because he received a greater than minimum sentence absent the requisite finding. [Id.] Respondent Warden Maggie Beightler opposes the petition. [Docs. 7, 8.]

On November 25, 2008, Magistrate Judge William H. Baughman, Jr. filed a Report and Recommendation that recommended the Court dismiss the Petitioner's writ. [Doc. 10.] The Magistrate Judge found that Moncrief's two grounds for habeas review were not fairly presented to

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the Supreme Court of Ohio because Moncrief first raised these grounds as part of his delayed application to reopen his direct appeal – that the state appellate court denied – and did not seek a review of this denial in the Supreme Court of Ohio. [*Id.* at 15.] Moreover, the Magistrate Judge determined that Moncrief did not present evidence excusing this procedural default because he did not show cause and actual prejudice or demonstrate that failure to consider his habeas claims would result in a fundamental miscarriage of justice. [*Id.* at 15-17.] As a result, the Magistrate Judge found that federal habeas review of Moncrief's claims was barred. [*Id.* at 17.] The Petitioner has not objected. The Court **ADOPTS** Magistrate Judge Baughman's Report and Recommendation.

The Federal Magistrates Act requires a district court to conduct a *de novo* review only of those portions of a Report and Recommendation to which the parties have made an objection. [28 U.S.C. § 636\(b\)\(1\)\(c\)](#). Parties must file any objections to a Report and Recommendation within ten days of service. [*Id.*] Failure to object within this time waives a party's right to appeal the magistrate judge's recommendation. [FED. R. CIV. P. 72\(a\)](#); *see also Thomas v. Arn*, 474 U.S. 140, 145 (1985); [United States v. Walters](#), 638 F.2d 947, 949-50 (6th Cir. 1981). Absent objection, a district court may adopt the magistrate's report without review. *See Thomas*, 474 U.S. at 149. Moreover, having conducted its own review of the parties' briefs on the issue, the Court agrees with the conclusions of the Magistrate Judge.

Accordingly, the Court adopts in whole Magistrate Judge Baughman's findings of fact and conclusions of law and incorporates them fully herein by reference. The Court thus **DENIES** the Petitioner's § 2254 petition. Further, the Court certifies, pursuant to [28 U.S.C. §1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and no basis exists upon which to issue

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a certificate of appealability. 28 U.S.C. 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: December 11, 2008

s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICTJUDGE